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Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 64.

HELEN C. RAUB ET AL.

vs.

HELEN C. CARPENTER ET AL.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE PLAINTIFFS IN ERROR.

CHARLES POE,
VICTOR H. WALLACE,
For Plaintiffs in Error.

IN THE

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I.

Statement of the Case.

This is a writ of error to the Court of Appeals of the District of Columbia to have its order affirming certain orders of the Supreme Court of the District of Columbia holding a Special Term for Orphans' Court business, reviewed and reversed. (Record, 52, 53.) On the second of May, 1899, one Charles W. Hauptman died in Washington leaving an estate both real and personal, amounting to upwards of fifty thousand dollars. He left one sister surviving him,

Helen C. Carpenter, and a large number of nieces and nephews, the children of deceased brothers and sisters. He left a paper which was published as his last will on November 30, 1896, and a codicil thereto bearing date April 15, 1898. (Record, 21, 26.)

By the terms of the first of these papers, after a life estate in all his estate to a sister, Mary E. Hauptman, (who afterwards died during the life of the testator), he devised and bequeathed his estate substantially as follows: Six thousand dollars to Helen C. Carpenter, certain pecuniary legacies to various Methodist charitable organizations, and the residue, share and share alike, among his nieces and nephews, other than the plaintiffs in error, whom he disinherited. He appointed William E. Edmonston executor. The codicil merely bequeathed the further sum of ten thousand dollars to Helen C. Carpenter.

In December, 1899, the plaintiffs in error, who are heirs at law and distributees of Charles W. Haupman, the deceased, filed a caveat against said will and codicil, (Record, page 1), alleging want of testamentary capacity, fraud, and undue influence. And after answers filed (Record, pages 2, 5) issues were framed to be tried by a jury as to both the alleged will and codicil. (Record, page 5.)

The order framing these issues was dated March 19, 1900, and counsel agreed to try them on June 13 of that year. In accordance with the custom which then obtained, all issues of fact from the Supreme Court of the District of Columbia holding a Special Term for Orphans' Court business, were tried in Criminal Court No. 2 and by the jury selected for service in that Court. The juries to serve in all the Courts of

the District which have juries are selected on the first Tuesday of each month to serve for that month, and on that day are examined upon their oaths as to their qualifications to serve as jurors. In this particular instance the jurors for the month of June were so examined in open Court and in the presence of one of the counsel for the plaintiffs in error (Record, page 13) and, as is not disputed, one of the jurors so accepted swore falsely as to his age, and also as to whether he had ever been convicted of a felony or of a crime involving moral turpitude. On June 13, 1900, the case was called for trial, and a panel containing the name of this juror was handed to each side so that each side might strike four, leaving the remaining twelve to try the issues. It is not contended that either side knew that this juror had sworn falsely nor that he did not swear falsely nor that the fact of his having so sworn was discovered until after verdict.

At the beginning of the trial an order was passed by the Court making the caveators plaintiffs and the caveateees defendants, and "that the said issues be tried by the jury summoned for and now in attendance upon Criminal Court No. 2 of this Court, a jury of good and lawful men of the District of Columbia." (Record, page 7.) At the trial several exceptions were reserved to rulings of the Court upon questions of evidence, which are set out in the bill of exceptions. The Court instructed the jury at the request of the caveatees that there was no evidence of fraud or undue influence, but the question of testamentary capacity was left to them and they found in favor of the caveatees, the verdict being signed and returned on June 15. On June 26, 1900, an order

was passed admitting the will and codicil to probate and granting letters testamentary, which order recites that it is passed because of the proceedings before said jury. (Record, page 9.) On July 16, 1900, and during the same term of Court at which the verdict was rendered, and the order of Court based thereon was passed, the plaintiff in error moved to have said verdict and order set aside, said motion being under oath and accompanied with affidavits and records setting forth the incompetency and disqualification of the juror, Lewis, the facts surrounding his selection to serve, the diligence of the attorney representing the plaintiff in error, and the ignorance of the parties as to the falsity of the oath made by said juror by means of which he became a member of the panel. (Record, pages 9-14.) There is no dispute as to the truth of the allegations of this motion nor of the affidavits. After argument, the Court denied this motion. (Record, page 14.) The plaintiffs in error appealed from the order admitting the papers to probate and also from the order refusing to vacate said order and prosecuted their appeal to the Court of Appeals of the District of Columbia, where the action of the lower Court was affirmed, (Record, page 52), and it is from this order of said Court of Appeals and to review and reverse the same, that this writ of error is sued out.

II.

Assignment of Errors.

The Court below erred :

1. In affirming the order of the Supreme Court of the District of Columbia admitting the papers to probate and granting letters testamentary thereon.

2. In affirming the order of the Supreme Court of the District of Columbia denying the motion to vacate its order admitting said papers to probate and granting letters testamentary thereon.

3. In refusing to permit the witness, George A. Heinecke, to give his opinion as to the mental capacity of the deceased. (Record, page 18.)

III.

Argument.

The main question involved in this case is that which concerns the validity and binding effect of what the defendants in error claim to have been a verdict. As has been stated, it is conceded that one of the jurors in the cause was a convicted felon and a perjurer. The question may be thus divided: First, is such a person competent in law, his disqualifications being unknown and actually concealed at the time of his acceptance as a juror? Second, what is the effect of his disqualification upon the alleged verdict? Third, what is the extent of the diligence required of parties to ascertain the competency or qualifications of jurors presented to them by a Court or other official as being persons competent and qualified?

First. Was this juror competent?

Section 872 of the Revised Statutes of the United States provides that—

"No person shall be competent to sit as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and

lawful man, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

It seems hardly worth while so discuss the question as to the disqualification of the juror, for no one seems seriously to deny that this is the effect of the statute.

He was disqualified at the time he took his seat in the box, and that is the point of time to which such an inquiry is to be directed.

Second. What was the effect of this disqualification upon the alleged verdict?

This leads us to draw a distinction between competency and qualification, and to direct the attention of the Court to the divisions existing at common law. (And not altered by statute.) *Propter defectum, propter affectum, propter delictum.*

5 Bacon's Abridgement, Juries (E).
1 Coke Inst. 156.
3 Blackstone, 364.
Presbury vs. Commonwealth, 9 Dana, 204.
State vs. Brockhaus, 72 Conn. 105.
Garrett vs. Wienburg, 54 S. Car. 128.

These divisions are inherent and still exist and are recognized, as the following authorities will demonstrate, as well as those above cited:

Kohl vs. Lehlback, 160 U. S. 293.
Herman vs. Bradshaw, 4 Bibb (Ky.) 45.
Shane vs. Clarke, 3 H. and McH. (Md.) 101.
Com. vs. Babcock, 1 Conn. 401.
Rex vs. Tiemearne, 5 B. & Cres. 254.
Sellers vs. The People, 4 Ill. 412.
Essex vs. McPherson, 64 Ill. 349.

Mylock vs. Saladine, 1 Wm. Black. 481.
Hardy vs. Sprowle, 32 Me. 310.
U. S. vs. Angney, 6 Mackey, 66.
Jeffries vs. Randall, 14 Mass. 205.
Wassum vs. Feeney, 121 Mass. 93.
Johns vs. Hodges, 60 Md. 215.
1 Thompson on Trials, sec. 116 *et seq.*
Averitt vs. State, 76 Md. 532.

The juror Lewis was a convicted felon. He got upon the panel through perjury and was not *homo bonus et legalis*. A perjurer cannot be a peer.

Third. What is the extent of the diligence required of parties to ascertain the competency of qualifications of Jurors presented to them by a Court or other officials as being persons competent and qualified?

The degree of diligence required of parties to ascertain the competency or qualifications of a juror should find its limit within the boundary of common sense. The jury commissioners are charged with the duty of placing the name of no person convicted of a crime, involving moral turpitude, upon the jury list. It is not to be presumed when a panel selected by them is offered to the parties as a jury for the trial of a particular case, that the jury commissioners have been lax in this duty, and that any one of these jurors is a convicted felon, and hence a person disqualified to serve by the express language of the statute, as well as at common law.

The jury commissioners first determine the statutory qualifications of the jurors, the Court then again examines them on this point for the sake of double security. Then, if there be disqualifications by interest, by relationship, or the like, it is the duty of the

parties to ascertain them by an examination of the jurors on their *voir dire*. But it is not necessary that the parties again travel over the same ground covered by both the jury commissioners and the Court, for it is not supposed that a juror will be more truthful in answering an examining counsel than he was in answering the Court itself. When the counsel for the caveators heard the juror Lewis state once under oath, in open Court, and in reply to a direct question by the presiding judge, that he was of lawful age and not disqualified by a conviction of crime, counsel had done all in the premises that the most rigid Court in the United States, or any other common law jurisdiction has ever required of parties or their attorneys; he had learned from the mouth of the juror himself, when under oath on an examination in open Court, that he was a qualified juror. It was not reasonable to require him to search further, for it must be remembered that it was not because Lewis had been convicted in a Court in the District of Columbia, that he was disqualified, but because he had been convicted of larceny, no matter where. A conviction in any State in the Union, or even in a foreign country, would have equally disqualified. Under a rule which would require a search into the past life of a juror in spite of his statements under oath, that search must extend to the criminal dockets of every jurisdiction in the United States and every foreign country having a recognized system of criminal laws—a thing which is manifestly impossible and consequently unreasonable.

Knights of Pythias vs. Steele, 63 S. W. 1126. (107 Tenn. 1.)
State vs. Groome, 10 Iowa, 308.
Hill vs. The People, 16 Mich. 351.

It will not do to say that no harm has been done, because the Court would have rendered the same verdict the eleven competent jurors and one incompetent one brought in, or even that if twelve competent jurors had brought in a different verdict the Court would have set it aside. The appellants had the constitutional right to a jury of good and lawful men—a common law jury.

Traction Co. vs. Hoff, 174 U. S. 1.
Briggs vs. Georgia, 15 Vt. 61.
Mann vs. Fairle, 44 Vt. 672.
Quinn vs. Halbert, 52 Vt. 353.
Ga. R. R. vs. Cole, 73 Ga. 713.
Knights of Pythias vs. Steele, 63 S. W. 1126. (107 Tenn. 14.)

If it be assumed (as is conceded in the opinion of the lower Court at page 50 of the Record), that Lewis was "wholly disqualified to act as a juror;" * * * "that the crime of perjury is too frequently committed in judicial proceedings;" * * * "the fountains of justice should not be allowed to be polluted with impunity by such crimes committed in the course of its administration;" * * * "the jury in this case may have been tainted by the presence on its panel of one repeatedly convicted of petty larceny and shown to have been guilty of perjury," does it not necessarily follow that the plaintiffs in error are entitled to a trial by a jury? Judge Morris says it does not, because it is a matter of discretion in the trial Court. We contend that we did everything reasonable to be expected of us to obtain a fair, honest, competent and qualified jury.

Knights of Pythias vs. Steele, 63 S. W. 1126 (107 Tenn. 1.)

Promptly and *within the term* the motion to vacate the order was made; its denial is a final judgment against us, its grant would have been but a trial of the issues by a forum insured to us by the Constitution.

Hof vs. Traction Co., 174 U. S. 1.

The refusal to grant a motion to strike out a judgment made within the term is subject to review on appeal.

Spalding vs Crawford, 3 App. D. C. 361.
Green vs. Hamilton, 16 Md. 317.
Hall vs. Holmes, 30 Md. 558.
2 Poe Pl. & Pr. Sec. 388 *et seq.*

2. As to the Third Assignment of Error.

George A. Heinecke was competent as a witness to express his opinion as to the sanity of the deceased, and the question of the value and weight of his testimony was for the jury. He was just as competent to express his opinion as to the lack of testamentary capacity as were the witnesses produced by the caveatees and permitted by the Court to give their opinion as to the alleged competency of the deceased. The law does not make a different rule for witnesses who testify as to *sanity* from the one applied to witnesses as to *insanity*. His testimony should have been permitted to go to the jury.

Ins. Co. vs. Lathrop, 111 U. S. 612 (619 especially.)
Taylor vs. U. S., 7 App. D. C. 27.

It is respectfully submitted that the order of the Court of Appeal of the District of Columbia, affirming the orders of the Supreme Court of the District of Columbia, should be reversed.

CHARLES POE,
VICTOR H. WALLACE,
For Plaintiffs in Error.